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CHARLES E. SMITH

No. 223

In the Supreme Court of the United States

OCTOBER TERM, 1941

INTERSTATE COMMERCE COMMISSION AND THE
PACIFIC ELECTRIC RAILWAY COMPANY, APPEL-
LANTS

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION AND
BROTHERHOOD OF RAILROAD TRAINMEN, APPEL-
LEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR INTERSTATE COMMERCE COMMISSION

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1. The appellees, in support of their contention that the Commission, in authorizing abandonments of railroad lines, is empowered to impose conditions for the protection of railroad employees, rely on the fact that the Commission has such authority in cases of consolidation (*United States v. Lowden*, 308 U. S. 225), and their view that its authority is not different in cases of abandonment. Their argument in support of this view is largely

(1)

predicated on the proposition, which we believe to be unsound, that, while the statute uses different language and standards in the two sections of the Act involved, no distinction of any substance was intended to enter into the different standards prescribed (Br. 14).

Congress in committing to the Commission the matter of consolidations, etc., by section 5 (4) of the Act, empowered it to attach such conditions as it shall find to be *just and reasonable* and promotive of *the public interest*; whereas, in committing to the Commission the matter of abandonments by section 1 (18)-(20) of the Act, it empowered the Commission to attach such conditions as in its judgment are required by *the public convenience and necessity*. Despite the different standards employed by Congress, the appellees urge that there is no distinction of substance between the standards laid down, and, in effect that, therefore, since the factor of protection of railroad employees enters into *the public interest*, it also enters into *the public convenience and necessity* (Br. 14). This position is, we believe, untenable. Disregarding for the moment the fact that appellees' contention practically ignores the other standard giving the Commission authority to attach conditions that it finds to be *just and reasonable*, the standard of *the public interest* is plainly broader than the standard of *the public convenience and necessity*, and recognition has to be given

to this, for the reason, if no other, that appellees' position that there is no distinction between those standards assumes that Congress' use of different standards was without purpose.

The only authority cited by appellees, in support of their position that there is no distinction between the different standards laid down by Congress is the statement made in a text book to the effect that the standard of public convenience and necessity "but sets up the usual standard of *public interest* and thus leaves the determination of concrete policy to the administrative tribunal." (Br. 13). This statement is obviously loosely made and is of little more significance than the fact that, as also relied on by appellees, Court and Commission decisions quite often refer to the Commission's finding of public convenience and necessity as a finding of public interest. Of greater significance is the fact that appellees mention no instance where the broader finding of public interest is referred to as a finding of public convenience and necessity. And we are unable to recall any instance where, for example, the Commission's finding of public interest under section 20a, or under section 5, of the Act is referred to as a finding that an issue of securities, or a consolidation, is consistent with the public convenience and necessity.

As stated by appellees (Br. 11), the purpose of Transportation Act, 1920, of developing an ade-

quate and efficient transportation service for the country was sought to be implemented by giving the Commission authority over many matters not theretofore committed to it, including authority over the extensions, or abandonments, of lines pursuant to section 1 (18). But it does not follow that, because the protection of employees (Br. 16) is a matter related to that Act's purpose of securing an adequate and efficient transportation service and is a factor entering into the public interest in consolidation cases (*United States v. Lowden*, 308 U. S. 225, 231), that it is also a factor entering into the *public convenience and necessity* either as a factor against the authorizing of an abandonment, or as a factor for the imposing of a condition for protection of employees, if the abandonment be authorized.

In the first place, contrary to the assertion of the appellees, the abandonment provisions do not occupy a position in Transportation Act, 1920, anything like the position occupied by the consolidation provisions. As emphasized by the *Lowden* case, *supra* (232), the consolidation provisions embody a national policy to encourage consolidations which policy has itself imposed severe hardships on railroad employees (Br. 9, 10). While a clause prohibiting consolidations without Commission approval was added to the consolidation provisions (Sec. 5 (6)) in 1933, prior to that time the only federal restraints preventing consolidations were the antitrust laws; and these, of

course, continue to operate as such and are a restriction upon consolidations until Commission approval is secured (Sec. 5 (11)). The consolidation provisions evidence the policy to encourage consolidations by placing consolidations authorized by the Commission outside the anti-trust laws and by directing the Commission to prepare a plan of consolidation of the railroads of the country. This policy did in fact greatly stimulate consolidations and, as shown by appellees, cast a heavy burden on railroad employees (Br. 9). On the other hand, there is no national, or statutory, policy to encourage abandonment of lines. The statute has from the time of its enactment in 1920 prohibited the abandonment of lines unless Commission authority was first obtained. While Congress, by the enactment, superseded state authority as to certain branch lines within state boundaries (*Colorado v. United States*, 271 U. S. 153), those lines were placed under the federal prohibition against abandonments together with the whole country-wide system of interstate lines. It is clear that the abandonment provisions embody no such policy as the consolidation provisions. The Commission is not directed to formulate a plan to accomplish the abandonment of railroad lines and Congress' relaxation of the antitrust laws has no application to abandonments.

In the second place, consistently with appellees' view that, because abandonments of lines de-

prive of employment, the effect on railroad employees is a factor entering into the determination as to whether the public convenience and necessity permits thereof, it might be urged that, because extensions of lines provide employment, such favorable effect is a factor entering into the determination as to whether the public convenience and necessity requires proposed extensions.¹ The prescribed standard is the same, namely, the public convenience and necessity; and the fact is that the cases which most emphasize the part played by section 1 (18) in the purpose of Transportation Act, 1920, to secure an adequate and efficient transportation service are *Texas & Pacific Ry. v. G. C. & S. F. Ry.*, 270 U. S. 266, and *Piedmont*

¹ The mention by appellees (Br. 11-12) of various provisions which were added to the Interstate Commerce Act by Transportation Act, 1920, brings to mind that there were many provisions added at that time, and many amendments made (41 Stat. 456; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek Ry. v. United States*, 263 U. S. 456; *Wisconsin R. R. Comm. v. C. B. & Q. R. R.*, 257 U. S. 563) in most of which there was embodied the purpose of the 1920 Act to promote an adequate and efficient transportation service. Basically appellees' argument that there is no distinction between the standards governing consolidations and those governing abandonments in the matter of effect on railroad employment, might, if sound at all, be extended to each and every of the other provisions designed to implement said purpose of Transportation Act, 1920. But this Court's opinion in the *Lowden Case*, *supra* (232), shows that the decision has no application to "isolated" transactions. The consolidation provisions are to be considered by themselves and as embodying elements amounting to factors peculiar to those provisions.

& Northern Ry. Co. v. Interstate Commerce Commission, 286 U. S. 299, 311-312, which are cases involving extensions, instead of abandonments, of lines. But we find it difficult to believe that the effect on railroad employment whether in the case of proposed extensions of operations, or in the case of abandonments, is a factor entering into the public convenience and necessity. In this connection we find no answer in appellees' brief to the point we make in our main brief (pp. 51-52) where we said:

"* * * Under the authority conferred upon the Commission by paragraph (21) of section 1 authorizing the Commission to require a carrier by railroad to 'extend its line or lines,' there is a proviso requiring the Commission to find 'as to such extension,' that it is reasonably required in the interest of 'public convenience and necessity.' The words 'public convenience and necessity' as used in this last-mentioned paragraph would hardly be construed broadly enough, to include the interest of employees interested in the extension, but if they are not given that meaning, appellees' contention with respect to the authority of the Commission in abandonment cases, if adopted, means that the same words would have different meanings in the same Act, and in paragraphs applying to the same subject matter. Paragraphs (18-21) of section 1 are part of a single statutory scheme gov-

erning the construction of new lines and the abandonment of old lines. The Court will adopt a construction not contrary to 'the scheme and structure of the legislation' " (*Cooper case, supra*).

However, it is believed that the legislative history set forth in our main brief (Br. 9-38) affords the most complete answer to the contention of the appellees in chapter 1 of their brief. It is there shown very definitely, we think, that Congress had in mind the differences between the language in the abandonment section and the language in the consolidation section, and rejected the point made here that they mean one and the same thing.

2. The second point urged by appellees is that the Commission's consistent administrative interpretation is entitled to no weight for a number of reasons, the first of which is that its decision in the *Chicago G. W. Ry. Case*, 207 I. C. C. 315, was erroneous in the first instance. No effort was made to have this decision reviewed in the courts, and it has been consistently followed by the Commission in decisions prior and subsequent to this Court's decision in the *Lowden case*. It is also urged that the Commission's interpretation dealt with a subject outside the sphere of its technical knowledge, consequently it is entitled to "relatively little weight" (p. 25 of appellees' brief). This is to urge that the Commission is a body of experts when it answers in the affirmative, but is not a body of experts when its answer is in the negative.

Next it is urged that while contemporaneous construction of a statute is entitled to some weight, this statute was enacted in 1920 and there was no construction of it in the particulars involved here until 1935. There are two answers to this proposition: (1) The Commission was never asked prior to its decision in 1935, to impose conditions such as those here sought, consequently there was no need prior to that date for it to make any utterances with respect thereto. Since that date and up to the present time its decisions have all been one way, and appellees do not dispute this. (2) The kind and nature of the terms and conditions that the Commission has felt it could impose in abandonment cases, from the time of the enactment of these provisions in 1920, have been set out in our main brief (Br. 55-56).

3. The legislative history is attempted to be explained away (pp. 30-58 of appellees' brief), but we think without success. At page 34 of its brief appellees urge, with respect to the legislation culminating in the Transportation Act of 1940, "that the purpose of Congress was such that the protection of employees injuriously affected by consolidations of railroads was a necessary and integral part of that purpose, while a similar protection in relation to abandonments was entirely foreign thereto."

The *Lowden Case*, holding that the Commission had authority to impose conditions in consolida-

tion cases, was decided by this Court in December, 1939. The Transportation Act was not finally approved until September 18, 1940. If appellees' contention in this respect is to be adopted, it appears that Congress was devoting considerable time and energy to inserting in the law authority which this Court had already held the Commission had. We can agree with the statement made on page 42 of appellees' brief:

"The question of employee protection in the event of abandonment was, in 1938, and still is a bitterly contested one between railroad management and railroad labor."

This statement does not coincide with appellees' argument that the Commission's authority to impose terms and conditions such as here sought has been so clear since 1920 that resort to legislative history is unnecessary. Their statement that the question of employee protection in cases of abandonment was, and still is, a bitterly contested one, carries with it the thought that there is very good ground for doubt that the Commission is already vested with authority over the matter, and yet their position here is that that should be held to be the case predicated on the use by Congress of the general words public convenience and necessity.

At page 43 of appellees' brief a quotation is given from the testimony of Mr. Harrison before the House Committee. We note that a line has been inadvertently omitted in the next to the last

paragraph of the indented portion appearing on page 43 and, as it seems of some materiality, we are reproducing the paragraph with the omitted portion italicized. It reads as follows:

"Now, if the Government should intervene through its powers and undertake to bring about abandonments, of course, that is a new situation for us and we think *we would insist that those matters ought to be considered and we think* it would be fair if governmental assistance was brought into the abandonments of properties, that the Government should then provide for protection in those instances."

In repeating this language at the top of page 44 of appellees' brief, the same insertion should be made.

It is urged at various places in the brief of appellees that the question of employee protection in abandonment cases was not placed before Congress "in any emphatic way" (Br. 53); and that it was not actually placed before the Congress (Br. 55); but only in "three fleeting appearances on the stage" (Br. 55). At the same time it is admitted (pp. 55-56) that all testimony concerning abandonments when placed in one brief "may be made to assume an impressive appearance" (Br. 55-56). These statements are not entirely consistent. The fact of the matter is that the legislative history is wholly convincing of the contentions made by the Commission in its main brief

and, as pointed out by Mr. Harrison in his testimony before the House Committee, when he in effect said that the Washington Agreement would protect labor in consolidation cases, if they wanted further protection in abandonment cases, the matter should be taken up with the carriers. Mr. Harrison in his testimony, when asked by Congressman Wolverton if there were any suggestions made by either management or men that have merit and that do not appear in the report of the Committee of Six, answered as follows:

"Mr. HARRISON. No, I would say this, Congressman: We tried to be realistic about it and if I were writing a prescription for the railroads and had the power of Mussolini or Hitler I think I could give you a panacea; but on the other hand, realizing that this is a democratic country and you can only go so far as public opinion will support you and the practicalities of the situation would warrant, I think the Committee of Six reached a conclusion upon what was within the realm of possibility and we have no recommendations whatever not contained in the report" (p. 226 of House Hearings):

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